

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

MICROSTRATEGY SERVICES CORP.,)	
)	
Plaintiff,)	
)	
v.)	1:14cv1244 (JCC/IDD)
)	
OPENRISK, LLC,)	
)	
Defendant.)	

O R D E R

This matter is before the Court on MicroStrategy Services Corp.'s ("MicroStrategy") Motion to Voluntarily Dismiss pursuant to Federal Rule of Civil Procedure 41(a)(2). [Dkt. 177.] MicroStrategy requests the Court enter an order dismissing its complaint for breach of contract with prejudice and assessing any costs associated with this motion to MicroStrategy. (MicroStrategy's Mot. at 1.) Federal Rule of Civil Procedure 41(a)(2) states that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." OpenRisk does not oppose the requested relief. (MicroStrategy's Mot. at 1.)

The only issue that remains to be resolved is the scope of the Court's prior orders. Count I of the Amended Counterclaims was dismissed with prejudice. [Dkt. 68.] Counts

II and III of the Amended Counterclaims were dismissed without prejudice. [Dkts. 119, 157, 172.] OpenRisk was given leave to amend Counts IV and V of the Amended Counterclaim. (3/17/15 Mem. Op. [Dkt. 67] at 21-22.) OpenRisk never availed itself of the opportunity to amend within the ten-day time period prescribed by the Court's Order. (3/17/15 Order [Dkt. 68].)

MicroStrategy argues the dismissal of Counts IV and V should be with prejudice since OpenRisk failed to amend. OpenRisk argues the dismissal is without prejudice since the Court's order was silent as to the consequences of failing to amend. As the Court dismissed Counts IV and V for insufficient pleading, a procedural defect, the dismissal of Counts IV and V is without prejudice. *See Knox v. Lichtenstein*, 488 F. Supp. 259, 260 (E.D. Mo. 1980) (dismissing claim for failing to plead fraud with particularity and stating "though it was not specified as 'without prejudice,' it is clear that a dismissal for such a procedural defect does not operate as an adjudication on the merits."), *aff'd*, 654 F.2d 19 (8th Cir. 1981).

Accordingly, it is hereby ORDERED:

- (1) The dismissal of Counts IV and V from the Amended Counterclaims is WITHOUT PREJUDICE;
- (2) MicroStrategy's Motion to Voluntarily Dismiss [Dkt. 177] is GRANTED. MicroStrategy's breach of contract claim is DISMISSED WITH PREJUDICE;

- (3) Pursuant to E.D. Va. Local Civil Rule 54(G),
MicroStrategy shall pay \$3,889.30, the cost of
impaneling a jury, to the Clerk of Court within ten
(10) days of the date of this Order;
- (4) The Clerk of Court shall forward a copy of this Order
to all counsel of record. IT IS SO ORDERED. THIS
ORDER IS FINAL.

July 9, 2015
Alexandria, Virginia

/s/
James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE